CLERK'S COPY.

CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~682~~ 106

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

vs.

I. B. KOCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED MAY 8, 1930

I

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 882

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

vs.

I. B. KOCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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112884—30

1 United States Circuit Court of Appeals for the Ninth Circuit

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE, Appellant
vs.
I. B. KOCH, APPELLEE
No. 5794

Appeal from the United States District Court for the District of Arizona

CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, UNDER SECTION 239 OF THE JUDICIAL CODE

Statement of facts

(Filed April 28, 1930)

I. B. Koch and Margaret E. Koch are husband and wife and both are citizens of the United States. For more than fifteen years prior to October 15, 1928, they have maintained their domicile in the State of Arizona. Neither husband nor wife had any property at the date of their marriage and neither has since acquired any property by gift, devise, or descent. All property, real or personal, now owned by them, including the income hereafter mentioned is, and during the year 1927 was, their community property under the laws of the State of Arizona. During that year the gross income of the community amounted to $12,042.45, of which sum $12,000.00 represented salary received by the husband and $42.45 represented interest from certain bank deposits, notes, and corporate stocks which the husband and wife had accumulated during the marriage and prior to 1927. After making the deductions allowed by law, which left a balance of $11,535.91, husband and wife made separate returns, each reporting one-half, or $4,767.96, as their respective incomes. Upon the income so reported the tax was $45.81, each, which each of them has fully paid, and it is admitted that all income taxes due from either husband or wife for the year 1927 has been fully paid if, as a matter of law, they had a lawful right to make such separate returns under the provisions of sections 210 and 223 (b) of the revenue act of 1926. 44 Stat. 21.

2 After the husband had filed his income tax return for the calendar year 1927, as above set forth, the Commissioner of Internal Revenue upon audit and examination determined that his return was incorrect in that all of the community income, both that reported by the husband and that reported by the wife, should have been reported by the husband alone, and the tax calculated upon the one net income of $11,535.91 instead of two incomes of $5,767.96 each. Accordingly, the Commissioner of Internal Revenue, under section 274 of the revenue act of 1926, determined against the husband a deficiency in income tax for the year 1927 amounting to $102.06. The husband

waived the opportunity afforded him of appealing to the Board of Tax Appeals and, upon the subsequent assessment of said additional tax by the Commissioner of Internal Revenue, he thereafter, on October 9, 1928, paid to Fred O. Goodell, collector of internal revenue for the District of Arizona, said additional tax plus interest in the sum of $3.26, a total of $105.32. This action was thereupon instituted by the husband to recover the amount of the additional tax thus imposed and collected. From a judgment in favor of the plaintiff for the amount claimed the collector of internal revenue has appealed.

Questions certified

For a proper decision of the above-entitled cause, now pending on appeal and duly submitted for consideration, instructions are respectfully requested of the Supreme Court on the following questions of law, concerning which we are in doubt, viz.:

(1) Under the provisions of §§ 210 and 223 (b) of the Revenue Act of 1926 must the entire community income of a husband and wife domiciled in Arizona be returned and the income tax thereon paid by the husband?

(2) Has the wife under §§ 3848 and 3850, Revised Statutes of Arizona, 1913, such an interest in the community income that she should separately report and pay tax on one-half of such income?

Dated April 28, 1930.

FRANK H. RUDKIN,
FRANK S. DIETRICH,
CURTIS D. WILBUR,
United States Circuit Judges.

[File indorsement omitted.]

3 A true copy.
Attest: April 29, 1930.
[SEAL.] PAUL P. O'BRIEN, *Clerk.*

[Indorsement on cover:] File No. 35,013. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 882. Fred O. Goodell, Collector of Internal Revenue, vs. I. B. Koch. Filed May 8, 1930. File No. 35013.

U. S. GOVERNMENT PRINTING OFFICE: 1930

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 106

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

vs.

I. B. KOCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED MAY 26 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 106

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

vs.

I. B. KOCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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1 In the United States District Court, District of Arizona

No. L.-599-PHX.—At Law

I. B. KOCH, PLAINTIFF,

vs.

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE, DEFENDANT.

2 *Complaint*

Filed Oct. 15, 1928

To the honorable the Judges of the District Court of the United States for the Distric of Arizona:

Comes now the plaintiff I. B. Koch, and for cause of action herein alleges:

I

That plaintiff is and at all the times herein mentioned was a citizen of the United States of America and of the State and district of Arizona, residing at Flagstaff in the county of Coconino in said State and district of Arizona. That the defendant is the duly appointed, qualified and acting collector of internal revenue for the district of arizona, residing in the city of Phoenix, county of Maricopa, in said State and district of Arizona.

II

That the acts and conduct on the part of the said defendant hereinafter complained of were done by him in his official capacity, under instructions from his superior officers. There was probable cause for his conduct, and he is entitled to a certificate of probable cause in the event judgment is rendered against him herein.

III

That for more than fifteen years plaintiff and Margaret E. Koch have been husband and wife, and during all of said period plaintiff and his said wife have continuously maintained and now
3 maintain the marriage relation, and have continuously during said period lived in the State of Arizona and have been citizens thereof. Neither the plaintiff nor his said wife had any property at the date of their marriage, and neither has since acquired any property by gift, devise, or descent.

IV

That by their joint efforts plaintiff and his said wife had, prior to the calendar year 1927, accumulated certain bank deposits, notes,

and corporate stocks, from which during said calendar year 1927 they received interest in the amount of $42.45, and which said bank deposits, notes, and corporate stocks at all times stood in the name of plaintiff.

V

That in the calendar year 1927, plaintiff was in the employ of the Arizona Lumber & Timber Company at Flagstaff, Arizona, as manager of the business and affairs of said Arizona Lumber & Timber Company, and as such received a salary from said Arizona Lumber and Timber Company during said calendar year of 1927 amounting to $12,000.00.

VI

That neither the plaintiff nor the said Margaret E. Koch had or received any other income or revenue from any source during said calendar year 1927, nor was there any other revenue or income due or payable plaintiff or said Margaret E. Koch from any source during the said calendar year 1927.

VII

4 That plaintiff paid from said community funds in the year 1927 the following sums, which he alleges constitute allowable and proper deductions in the calculation of net income under the revenue act of 1926:

Contributions to Catholic church	$250.00
Wear and tear on automobiles and miscellaneous expense	200.00
Taxes	56.54
That these expenses so paid total	$506.54

VIII

That plaintiff and his wife each filed with the defendant at the time required by law income-tax returns for the year 1927, in a faithful and bona fide effort to report their said income, and all their income-tax liability thereon, as required by the revenue act of 1926. That in so doing each reported the entire amount of the interest and salary received by the plaintiff as above set forth, and deducted therefrom the expenses and allowances above itemized, and each reported as net taxable income one-half of the remaining sum. The gross income so reported was $12,042.45, the deductions totaled $506.54, leaving a balance of $11,535.91, of which each reported one-half, or $5,767.96, as their respective net incomes.

IX

That the tax liability of the plaintiff and his said wife, upon the income so reported by them at the rates provided by the revenue act of 1926, was $45.81 each, and each of them has paid the said sums at the time required by law to the defendant.

X

That after the plaintiff had filed his income tax return for the calendar year 1927 as above set forth, said return was audited and examined by the Commissioner of Internal Revenue, who determined that the plaintiff's said tax return was incorrect, and that the tax liability shown therein was insufficient in that, as determined by said Commissioner of Internal Revenue, all of said income, both that reported by the plaintiff and that reported by his said wife, should have been reported by the plaintiff and the tax calculated by the rates provided for by the revenue act of 1926, upon one net income of $11,535.91, instead of two net incomes of $5,767.96 each. Said commissioner notified the plaintiff by registered mail of this determination in accordance with section 274 of the revenue act of 1926, and that he proposed to assess against him a deficiency in income tax for the year 1927, on account thereof, amounting to $102.06.

XI

That the plaintiff waived the opportunity afforded him to appeal from said determination to the United States Board of Tax Appeals, and thereafter, in October, 1928, the said sum, with interest in the sum of $3.26, making a total of $105.32, was assessed against him by said commissioner and the assessment certified to the defendant for collection, who thereupon made formal notice and demand upon plaintiff for the payment of said sum.

XII

That plaintiff paid to the said defendant on October 9, 1928, the sum so demanded of him, and at the time of said payment protested in writing against the collection of said sum and notified the defendant that the said sum was paid only to avoid the imposition of further penalties and interest, and the seizure and sale of plaintiff's property which would result if the said sum were not paid.

Thereafter the plaintiff filed with the defendant a claim for the refunding of said sum in the manner required by law, which claim was based upon the facts and claims herein set forth, and this claim was rejected by the Commissioner of Internal Revenue on October 10th, 1928.

XIII

Plaintiff alleges that all of the income so reported by him and his said wife for the calendar year 1927 was their community income and property under the laws of the State of Arizona and belong jointly and equally to them, and that he is not subject to taxation under the revenue act of 1926 upon his said wife's one-half of said community income, and that the action of the Commissioner of Internal Revenue in adding to the income so reported by him the share of said community income received and reported by his wife was illegal and erroneous, and likewise the assessment and col-
7 lection of said additional sum as tax and interest for the year 1927 was improper, illegal, and erroneous, and contrary to the terms and provisions of the revenue act of 1926.

XIV

Plaintiff further alleges that the effect and result of the acts and conduct of the defendant in demanding and collecting from plaintiff a tax upon his income plus that of his said wife is to levy and collect a tax upon something not within the meaning of the term "income" as it is used in the sixteenth amendment to the Constitution of the United States.

XV

That the exaction and collection of the said sum heretofore referred to by defendant deprives plaintiff of his property without due process of law, in violation of the fifth amendment to the Constitution of the United States.

XVI

That the revenue act of 1926, if by its terms it provides for and requires that the income from the property of plaintiff and his said wife be taxed in the manner and amount exacted of plaintiff by the collector of internal revenue is as to this plaintiff unconstitutional and void, in that:

(a) It requires the collection from plaintiff of a tax based in whole or in part upon the income of the said Margaret E. Koch.

(b) It requires the collection from plaintiff at progressive rates of a tax, based not upon his income alone but upon the com-
8 bined incomes of plaintiff and the said Margaret E. Koch, thereby not only obliging plaintiff to pay upon an income not his own but obliging him to pay at a higher rate upon his own income.

(c) It forbids and prohibits plaintiff and Margaret E. Koch from filing separate income tax returns, including therein the income only belonging to and received by them respectively, which right is allowed under the revenue act to citizens of the United States.

(d) It is arbitrary and capricious in that it uses as a basis and as the subject of a tax assessed against and collected from plaintiff at progressive rates the combined incomes of himself and the said Margaret E. Koch, instead of the income only of plaintiff.

(e) It provides for the taking of the property of the plaintiff without due process of law and denies to him the equal protection of the law, in violation of the fifth and sixteenth amendments to the Constitution of the United States.

XVII

That because of the facts herein alleged plaintiff is entitled to have and recover from the defendant the tax and interest so paid, together with interest thereon as provided by law.

Wherefore, plaintiff prays for the issuance of citation to the defendant, and that upon final hearing hereof he have judgment against
9 defendant for the tax and interest so paid, amounting to $105.32, together with interest thereon from the date of payment at the rate of six per cent per annum and all costs of suit; that there be issued by the Court a certificate of probable cause for the conduct of defendant in his official capacity as aforesaid, and that plaintiff have such other and further relief as he may be entitled to.

ELLIOTT & SHIMMEL,
CURLEY & PATTEE,
Attorneys for Plaintiff.

In United States District Court

Summons and marshal's return

Filed Oct. 16, 1928

Action brought in said District Court and the complaint filed in the office of the clerk of said District Court in the city of Phoenix, and county of Maricopa.

The President of the United States of America, greeting, to Fred O. Goodell, Collector of Internal Revenue, Defendant:

Action brought in said District Court and the complaint filed in an action entitled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within twenty days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer
10 as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the court for any other relief demanded in the complaint.

Witness the honorable F. C. Jacobs, judge of said district court, this 16th day of October, in the year of our Lord one thousand nine hundred and twenty-eight, and of our Independence the one hundred and fifty-third.

[SEAL.]

C. R. McFALL,
Clerk.
By M. R. MALCOLM,
Deputy Clerk.

UNITED STATES MARSHAL'S OFFICE,
District of Arizona.

I hereby certify that I received the within writ on the 16 day of Oct., 1928, and personally served the same on the 16th day of Oct., 1928, upon Fred O. Goodell, collector of internal revenue, by delivering to, and leaving with Roy Dadison as asst. collector of internal revenue, said defendant named therein personally, at the city of Phoenix, county of Maricopa, in said district, a certified copy thereof, together with a copy of the complaint, certified to by C. R. McFall attached thereto.

G. A. MAUK,
U. S. Marshal.
By J. W. MCCORMICK,
Office Deputy.

Oct. 16, 1928.
[File endorsement omitted.]

11 In United States District Court

Demurrer

Filed Dec. 19, 1928

Comes now the defendant above named, by the United States attorney, and demurs to plaintiff's complaint, on the ground that said complaint does not state facts sufficient to constitute a cause of action against the defendant.

Wherefore defendant prays that said complaint be dismissed and that plaintiff take nothing thereby and for costs.

JOHN B. WRIGHT,
United States Attorney.
By B. E. MARKS,
Assistant United States Attorney.
THOMAS H. LEWIS, JR.,
Special Assistant to the Attorney General.

Received copy of above this 19th day of December, 1928.

ELLIOTT & SHIMMEL,
CURLEY & PATTEE,
Attorneys for Plaintiff.

12 In United States District Court, District of Arizona

No. L.–599—Phoenix

I. B. KOCH, PLAINTIFF
vs.
FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Judgment

Filed Mar. 20, 1929

This cause came on for hearing before the above-named court on the 19th day of December, 1928, upon the demurrer of the defendant to the plaintiff's complaint and was argued by counsel for the respective parties. And arguments in writing were subsequently submitted the court and the cause taken under advisement. Thereafter, and on the 6th day of February, 1929, the court being fully advised in the premises, did order that the defendant's said demurrer be overruled. And the defendant, not desiring to plead further but electing to stand upon his said demurrer, it was thereupon ordered that judgment be entered in favor of the plaintiff as prayed in the complaint.

Now, therefore, pursuant to said order for judgment, it is by the court,

Ordered, adjudged, and decreed that the plaintiff, I. B.
13 Koch, do have and recover of and from the defendant Fred O. Goodell, collector of internal revenue, the sum of one hundred five and 32/100 ($105.32), together with interest thereon at the rate of six per cent per annum from the 31st day of October, 1928, until paid.

And it is further ordered, adjudged, and decreed that the said plaintiff do have and recover of and from said defendant the costs of this action, taxed at the sum of $12.00.

And it further appearing from said complaint that this action is brought against the defendant in his official capacity as collector of internal revenue to recover a sum of money assessed and collected as a further and additional income tax for the year 1927, and that in so assessing and collecting the said tax the defendant acted with probable cause for so doing: Now, therefore, it is

Ordered, adjudged, and decreed that in making such assessment and collection of said tax, recovery for which is sought in this action, the said defendant, though in error in so doing, acted in good faith and with probable cause, and that a certificate to that effect be issued.

Done in open court this 20th day of March, 1929.

F. C. JACOBS,
United States District Judge for the District of Arizona.

14 In United States District Court

Præcipe for transcript of record

Filed Mar. 29, 1929

To the clerk of the above-entitled court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal heretofore allowed by said court, and include in the said transcript the following pleadings, proceedings, and papers on file, to wit:

I. Complaint.
II. Summons.
III. Demurrer.
IV. Judgment.
V. This præcipe.
VI. Clerk's certificate.
VII. Petition for appeal.
VIII. Order allowing appeal.
IX. Notice of appeal and waiver.
X. Bill of exceptions.
XI. Assignment of errors.

Dated this 29th day of March, A. D. 1929.

JOHN C. GUNG'L,
United States Attorney.
By LEMUEL P. MATHEWS,
Asst. United States Attorney.

15 ACCEPTANCE OF SERVICE

Acceptance of service of the foregoing præcipe was hereby accepted this 29th day of March, A. D. 1929.

CURLEY & PATTEE,
ELLIOTT & SHIMMEL,
Attorneys for Plaintiff.

In United States District Court

Petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit

Filed Mar. 29, 1929

To the Honorable F. C. Jacobs, Judge of the District Court of the United States for the District of Arizona:

The above-named defendant, through his attorney, Lemuel P. Mathews, Assistant United States Attorney for the District of Arizona, conceiving himself aggrieved by the order and judgment made and entered on the 20th day of March, A. D. 1929, in the above-entitled cause, does hereby appeal from the said order and judgment to the

United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed and that a
16 transcript of the record, proceedings, and papers from which said order and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN C. GUNG'L,
United States Attorney.
By LEMUEL P. MATHEWS,
Asst. United States Attorney.

The foregoing claim of appeal is allowed.
Dated at Phoenix, Arizona, this 29 day of March, A. D. 1929.

F. C. JACOBS,
United States District Judge.

(Endorsed:) Received copy of the within this 28th day of March, 1929.

ELLIOTT & SHIMMEL,
CURLEY & PATTEE,
Attorneys for Plaintiff.

In United States District Court

Order allowing appeal

Filed Mar. 29, 1929

At chambers before the Honorable F. C. Jacobs, United States district judge, the following proceedings were had:

In this cause, on motion of counsel for the defendant, and it appearing to the court that the above-named defendant has here-
17 tofore filed its petition for the allowance of an appeal, and concurrently therewith its assignment of errors:

It is ordered that an appeal for the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment in this cause, made and entered on the 20th day of March, A. D. 1929, be and the same is hereby allowed to said defendant, and

It is further ordered that the transcript of the record, proceedings, and papers, which will be transmitted by the clerk of this court, to the said United States Circuit Court of Appeals for the Ninth Circuit, be treated, considered, and duly authenticated as a transcript of the record, proceedings, and papers upon which this appeal is based, and transmitted to said United States Circuit Court of Appeals for its consideration in connection with said appeal.

F. C. JACOBS,
United States District Judge.

Received copy of the within this 28th day of March, 1929.

CURLEY & PATTEE,
ELLIOTT & SHIMMEL,
Attorneys for Plaintiff.

18 In United States District Court

Notice of appeal and waiver

Filed March 29, 1929

To judge and clerk of above-entitled court and to attorneys for plaintiff, Messrs. Elliott & Shimmel, Curley & Pattee:

You will hereby take notice that the defendant in the above-entitled case hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, on the order and judgment made and entered herein on the 20th day of March, A. D. 1929, overruling defendant's demurrer, wherein the defendant elected to stand upon the same, and the judgment entered by the court in favor of the plaintiff and against the defendant, as more fully appears in the assignment of errors herein filed.

JOHN C. GUNG'L,
United States Attorney.
By LEMUEL P. MATHEWS,
Asst. United States Attorney,
Attorney for Defendant.

The plaintiff above, I. B. Koch, acknowledges the receipt of notice of the filing of the petition for appeal herein, the allowing of said appeal, the assignment of errors, and now comes freely into court and avers there is no error in the record in this proceeding nor in the judgment rendered therein, and plaintiff prays that the United States Circuit Court of Appeals for the Ninth Circuit may proceed to examine the record in this proceeding, as aforesaid, as to all
19 matters assigned for error herein, and that the judgment aforesaid and forms aforesaid given may be in all things affirmed, and the said plaintiff hereby waives the necessity of defendant furnishing bond on appeal, and the issuing and service of citation or other process herein, and hereby enters the appearance of plaintiff in the appeal herein taken.

CURLEY & PATTEE,
ELLIOTT & SHIMMEL,
Attorneys for Plaintiff.

(Endorsed:) Received copy of the within this 28th day of March, 1929.

CURLEY & PATTEE,
ELLIOTT & SHIMMEL,
Attorneys for Plaintiff.

In United States District Court

Bill of exceptions and order settling same

Filed March 29, 1929

This cause came on for hearing before the Honorable F. C. Jacobs, judge of the District Court of the United States for the District

of Arizona, attorneys for plaintiff and defendant being present and the following proceedings were had, to wit:

"DEMURRER

Comes now the defendant above named, by the United States attorney, and demurs to plaintiff's complaint, on the ground that said complaint does not state facts sufficient to constitute a cause of action against the defendant.

20 Wherefore, defendant prays that said complaint be dismissed and that plaintiff take nothing thereby and for costs."

After consideration of said demurrer, the court overruled the same in the following language, to which the defendant excepted:

"The defendant's demurrer having been heretofore taken under advisement, and the court having duly considered the same, and being fully advised in the premises, does now

Order, adjudge, and decree that said demurrer be, and it is hereby overruled, to which ruling of the court the exception of the defendant is allowed."

And now come in furtherance of justice and that right might be done, the defendant tenders and presents the foregoing as his bill of exceptions in this case to the action of the court, and prays that the same may be settled and allowed, and sealed by the court and made a part of the record, and the same is accordingly done this 29th day of March, A. D. 1929.

F. C. JACOBS,
Trial Judge.

(Endorsed:) Received copy of the within this 28th day of March, 1929.

CURLEY & PATTEE,
ELLIOTT & SHIMMEL,
Attorneys for Plaintiff.

21 In United States District Court

Assignment of errors

Filed March 29, 1929

The defendant, Fred O. Goodell, collector of internal revenue, by Lemuel P. Mathews, assistant United States attorney for the District of Arizona, makes the following assignment of errors, which it avers occurred at said hearing, and prays for a reversal of the order and judgment as prayed for in his petition upon appeal:

1st. The court erred in overruling defendant's demurrer, on the ground that said complaint did not state facts sufficient to constitute a cause of action against the defendant.

2d. The court erred in holding that the husband and wife could make and render separate income-tax reports upon the community interests.

3d. The court erred in not dismissing the plaintiff's complaint.

Wherefore, the defendant prays that the said order and judgment be reversed.

JOHN C. GUNG'L,
United States Attorney.
By LEMUEL P. MATHEWS,
Asst. United States Attorney.

Received copy of the within this 28th day of March, 1929.

CURLEY & PATTEE,
ELLIOTT & SHIMMEL,
Attorney for Plaintiff.

22–23 And I further certify that the fees charged by me as constructive earnings against the United States for the preparation of this record amount to the sum of six and 55/100 dollars ($6.55).

[Clerk's certificate to foregoing transcript omitted in printing.]

25 In United States Circuit Court of Appeals, Ninth Circuit

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE, Appellant vs. I. B. KOCH, APPELLEE	No. 5794

Order of submission

Oct. 21, 1929

Ordered appeal in above cause argued by Mr. T. H. Lewis, jr., special attorney, Bureau of Internal Revenue, counsel for appellant, and by Mr. Blaine B. Shimmel, counsel for the appellee, and submitted to the court for consideration and decision.

26 In United States Circuit Court of Appeals

[Title omitted.]

Order directing filing of certificate certifying certain questions or propositions of law to the Supreme Court of the United States

April 28, 1930

By direction of the Honorable Frank H. Rudkin, Frank S. Dietrich, and Curtis D. Wilbur, circuit judges, before whom the cause was heard, ordered certificate certifying certain questions or propositions of law to the Supreme Court of the United States under section 239 of the Judicial Code be filed, and that a certified copy of said certificate be forthwith forwarded by the clerk of this court to the clerk of the Supreme Court of the United States.

27-28 [Certificate to Supreme Court omitted in printing, as it appears under separate cover.]

29 [Clerk's certificate to foregoing transcript omitted in printing.]

30 SUPREME COURT OF THE UNITED STATES

Order granting motion to bring up entire record and cause

May 26, 1930

On consideration of the joint motion for a writ of certiorari to bring up the entire record and cause,

It is now here ordered by this court that the said motion be, and the same is hereby, granted.

[Indorsement on cover:] File No. 35013. Supreme Court U. S. October term, 1929. Term No. 106. Fred O. Goodell, Collector, vs. I. B. Koch. Certified copy of transcript of record. Filed May 19, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

Office Supreme Court
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CHARLES ELMORE C
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FILE COPY

No. ~~302~~ 106

In the Supreme Court of the United States

OCTOBER TERM, 1929

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE, APPELLANT (BELOW)

v.

I. B. KOCH, APPELLEE (BELOW)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT MOTION TO BRING UP THE ENTIRE RECORD

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 882

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE, appellant (below)

v.

I. B. KOCH, APPELLEE (BELOW)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT MOTION TO BRING UP THE ENTIRE RECORD

Now come Fred O. Goodell, Collector of Internal Revenue, Appellant, and I. B. Koch, Appellee, in this cause in the United States Circuit Court of Appeals for the Ninth Circuit, now pending in this Court on questions certified by the said Circuit Court of Appeals, and move that this Honorable Court issue its writ of certiorari commanding that court to certify and send to this Court the entire record in this cause, in order that this Court may consider and decide the whole matter in controversy as upon appeal pursuant to Section 239 of the

113960—30

Judicial Code as amended by the Act of February 13, 1925, and Rule 37 of the Rules of this Court.

A certified transcript of the record in this case and nine printed copies thereof have been lodged with the Clerk of this Court as exhibits to this motion.

This was a suit commenced in the United States District Court for the District of Arizona by I. B. Koch, a resident of the State of Arizona, against Fred O. Goodell as Collector of Internal Revenue for the District of Arizona, to recover Federal income taxes paid under protest for the year 1927. The Commissioner of Internal Revenue refused to accept the separate returns filed by Koch and his wife in which each had reported one-half of the community income and made an assessment against Koch based on the inclusion in his return of the entire community income. The action was begun by Koch to recover the amount of the additional tax thus imposed and collected. From a judgment in favor of the plaintiff, the Collector duly appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which court, by certificate filed May 8, 1930, has certified to this Court the following questions:

> (1) Under the provisions of Sections 210 and 223 (b) of the Revenue Act of 1926 must the entire community income of a husband and wife domiciled in Arizona be returned and the income tax thereon paid by the husband?

(2) Has the wife under Sections 3848 and 3850, Revised Statutes of Arizona, 1913, such an interest in the community income that she should separately report and pay tax on one-half of such income?

While the questions certified cover all the decisive issues in this case, it is desirable in view of the importance of the question to the Government and to taxpayers residing in Arizona to avoid any possibility of further litigation by bringing up the entire record and having the Court finally determine the whole controversy.

A similar motion is being made in the case of *Burns Poe, Collector of Internal Revenue for the District of Washington,* v. *H. G. Seaborn,* No. 492 on the docket of this Court for the present term, which is also on certificate from the Circuit Court of Appeals for the Ninth Circuit, and involves the question of the taxation of community income in Washington. The Government is also submitting simultaneously herewith a motion to advance that case, the instant case, and also, in the event certiorari is granted, two other cases, involving the taxation of community income in Texas and Louisiana (*Hopkins, Collector, Petitioner,* v. *Bacon,* No. 821; *Bender, Collector, Petitioner,* v. *Pfaff,* No. 823), for hearing in sequence on October 27th next. It is believed that it would be of assistance to the Court to have before it at the hearing the entire record in the instant case.

Wherefore, the parties hereto jointly pray that this Honorable Court issue its writ of certiorari commanding the United States Circuit Court of Appeals for the Ninth Circuit to certify and send to this Court the entire record in this cause in order that this Court may consider and decide the whole matter in controversy as upon appeal.

FRED O. GOODELL,
Collector of Internal Revenue
For the District of Arizona.
By THOMAS D. THACHER,
Solicitor General.
I. B. KOCH,
By FRANK E. CURLEY,
SAMUEL L. PATTEE,
H. A. ELLIOTT,
B. B. SHIMMEL,
Attorneys.

MAY, 1930.

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No. 106

In the Supreme Court of the United States

OCTOBER TERM, 1930

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

v.

I. B. KOCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE COLLECTOR

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 106

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

v.

I. B. KOCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE COLLECTOR

OPINIONS BELOW

No opinion was rendered by either the Circuit Court of Appeals for the Ninth Circuit or the United States District Court for the District of Arizona.

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on May 8, 1930. On May 26, 1930, this Court granted a joint motion for a writ of certiorari to bring up the entire record. (R. 13.)

Jurisdiction is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented on the entire record are the same as those certified. These questions are:

1. Under the provisions of Sections 210 and 223 (b) of the Revenue Act of 1926 must the entire community income of a husband and wife domiciled in Arizona be returned and the income tax thereon paid by the husband?

2. Has the wife under Sections 3848 and 3850, Revised Statutes of Arizona, 1913, such an interest in the community income that she should separately report and pay tax on one-half of such income?

STATUTES INVOLVED

The relevant portions of the statutes involved will be found in the Appendix, *infra,* pp. 39–51.

STATEMENT

This case was decided by the District Court for the District of Arizona on a demurrer to the complaint. The facts as set forth in the complaint and admitted by the demurrer are substantially as follows:

I. B. Koch and Margaret E. Koch were married and lived together for more than fifteen years prior to October 15, 1928, and they have maintained their domicile in the State of Arizona. (R. 1.)

Neither husband nor wife had any property at the date of their marriage and neither has since acquired any by gift, devise, or descent. By their joint efforts appellee and his wife had prior to

1927 accumulated certain bank deposits, notes, and corporate stocks from which they received interest in the amount of $42.45 during 1927. The bank deposits, notes, and corporate stocks stood in the name of the husband. The appellee also received a salary of $12,000 for services rendered as manager of the Arizona Lumber & Timber Company. This was the total income which they received during the year. It is admitted that it represented community income. (R. 1, 2.)

The appellee and his wife filed separate returns for 1927 in which each listed the entire interest and salary mentioned above and deductions in the amount of $506.54, consisting of contributions to a church, depreciation of an automobile, and miscellaneous expense and taxes, the sum of $506.54 being the total deductions to which they were entitled. They reported a net income of $11,535.91, or $5,767.96 each, and each paid the tax of $45.81 disclosed by the return. (R. 2, 3.)

Upon the audit of the returns the Commissioner found a deficiency in tax of $102.06 disclosed by the return of the appellee, the deficiency being based on the failure of the latter to report the entire community income and the deductions in his return.

The appellee waived his right to appeal to the Board of Tax Appeals, paid the sum of $105.32 (including interest) under protest, and upon rejection of his claim for refund, which was duly filed, instituted this suit. (R. 3, 4.)

From a judgment in favor of the plaintiff, the Collector appealed to the Circuit Court of Appeals for the Ninth Circuit. That court certified certain questions to this Court. On May 26, 1930, this Court ordered that the entire record and cause be sent up.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In not holding that under the laws and judicial decisions of the State of Arizona the husband has such control over the community income that he should properly be required to report all of such income in his Federal income tax return for 1927.

2. In holding that the wife has such an interest in the community income that she and her husband are permitted to divide the community income between them in separate returns.

SUMMARY OF ARGUMENT [1]

This Court in the case of *United States* v. *Robbins*, 269 U. S. 315, held that a married man domiciled with his wife in the State of California should be taxed upon all of their community income, basing its decision in part on the fact that the husband alone could dispose of the fund and exercise exclusive rights of management and enjoyment over it.

[1] The following material to stars on p. 6 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

In *Corliss* v. *Bowers,* 281 U. S. 376, this Court again emphasized that the individual might be taxed on income which he had the right to control and enjoy irrespective of whether he held any title whatever to the fund from which it was derived.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. The *Corliss case* involved the constitutionality of Section 219 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), providing for the taxation of the income of revocable trusts to the grantors. Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), provides for taxing the income of certain types of trusts to the trustees, the income of other types to the beneficiaries, and the income of revocable trusts to the grantors.

Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 39, construed as similar provisions were construed in the *Robbins case,* do not require the taxation of income to the individual having purely formal rights of ownership. Their intent is that the tax shall fall upon the person exercising substantial rights of dominion and enjoyment.

In the *Robbins case* the rights of dominion and enjoyment were measured by very practical tests as to what the husband and wife could do with re-

spect to the community income. The possession of unimportant rights by the wife will not suffice to prove that one-half of the community income should be taxed to her, for wives in States not having the community property system also may restrict to a certain extent the husband's disposition of his property and income. The Act should, if possible, be so construed and applied as not to give married taxpayers residing in the community property States an undue advantage over married taxpayers residing in other States.

* * * * *[2]

Under the laws and judicial decisions of the State of Arizona, the husband, in addition to having a present interest in the community property equal in all respects to his wife's interest, has full powers of management as to community personalty and substantial powers as to community realty but can not convey, mortgage, or lease the latter without the wife's consent. He is the necessary party in all suits affecting the community property.

The only important restrictions on his powers is that he can not deliberately defraud his wife. This restriction is of little practical benefit to the wife, for while she may under certain conditions sue him for support, whether or not there is any community property, she can not secure a division of the community property or force her hus-

[2] See footnote 1, p. 4.

band to give her one-half or any other portion of the community income. Even upon securing a divorce, she may be awarded alimony instead of a share of the community estate.

While the better view probably is that the community property can not be made liable for the payment of the separate debts or the torts of either husband or wife, it is liable for all of the debts (and probably the torts) of the husband which are related to community affairs and presumably every act of his is undertaken on behalf of the community.

The wife may not bind the community by any contracts other than contracts for necessities. She has no positive powers of control and can not to any substantial degree interfere with the broad powers given to her husband. Her present interest in the community property is no more than a right to devise by will or to receive upon the dissolution of the community one-half of the then existing community property. If the dissolution is brought about by divorce, she may not even receive one-half.

The husband, having substantially all of the present powers of dominion and enjoyment, should be taxed upon the entire community income.

In the particular case this view is the more reasonable for the reason that the income consisted chiefly of the husband's salary. Cf. *Lucas* v. *Earl*, 281 U. S. 111.

ARGUMENT

I

Preliminary Statement[3]

The Treasury Department, following two opinions of the Attorney General, 32 Op. A. G. 298, 435, originally conceived that the characterization of the wife's interest in community property as vested or expectant determined whether the husband and wife might divide the community income between them in separate returns or whether the husband should be required to report the entire amount in his return. See T. D. 3071, Internal Revenue Cumulative Bulletin, No. 3, p. 221; T. D. 3138, Internal Revenue Cumulative Bulletin, No. 4, p. 238. It was accordingly held that a husband and wife domiciled in the States of Washington, Texas, Louisiana, Arizona, Nevada, New Mexico, and Idaho should be permitted to divide the community income between them in separate returns, while a similar privilege was denied to married taxpayers domiciled in California.[4]

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[3] The entire argument under Points I and II is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

[4] This procedure was subsequently given retroactive legislative approval as to 1925 and prior years by Section 1212 of the Revenue Act of 1926, *infra*, p. 40. That section was not intended to apply to taxes for subsequent years, and has no bearing on the question here involved.

Subsequently this Court, in the case of *United States* v. *Robbins,* 269 U. S. 315, indicated that the question as to whether community income shall be taxed to the husband alone or to the husband and wife in equal shares can not be made to depend solely upon whether the wife's interest is vested or expectant, and that in California, where the husband has substantially the sole right to control and enjoy the community property, the community income is properly taxed to him.

Following the decision in the *Robbins case,* the opinions of the Attorney General as to the taxation of income in the community property States were withdrawn (35 Op. A. G. 265), with the recommendation that the Treasury Department take action which would furnish grounds for the commencement of test suits to determine the proper method of taxing community income, the case at bar being one of the cases which has resulted from such action.

II

Where the Husband has Control Over and the Right to Enjoy the Entire Community Income He is Required to Include it in His Return for Federal Income-Tax Purposes

In general terms the statute imposes the tax "upon the net income of every individual" without specification of what is included in these words.

There is no reference in the statute to income from community property.[5] Such generality is unavoidable in Federal income tax laws intended to have uniform application throughout the States where the definitions of property rights and titles vary with the local laws.

The view originally held in the Treasury Department and in the Department of Justice (T. D. 3071, *supra;* T. D. 3138, *supra;* 32 Op. A. G. 298, 435, *supra,* that the wife has an interest in income from community property equal to that of her husband and should therefore be permitted to report one-half of it in her return was based upon local conceptions of title to the fund rather than of dominion and control of the income therefrom. The contention that the person who has formal title to a fund or to income therefrom must pay the tax when the power of disposition is vested in another finds no support in the language of the statute. Indeed the very generality of the words employed suggests that they are to be understood in their ordinary

[5] It is of interest that while the Revenue Acts of 1921 and 1924 were being drafted it was proposed that there should be included in them a provision for the taxation of community income to the spouse having the right of management and control. See Report of the Committee on Ways and Means of the House of Representatives, Report No. 350, 67th Congress, First Session, p. 11, and Conference Report No. 486 of the same Congress, p. 21; Hearings before the Committee on Ways and Means, House of Representatives, 68th Congress, First Session, Revenue Revision, 1924, pp. 194, 348, 349, 375, 478, 482. These proposals were defeated.

meaning implying dominion and control and not in any narrow, technical sense implying formal, legal, or equitable ownership.

Section 1 of the Revenue Act of 1916, c. 463, 39 Stat. 756, levied a tax "upon the entire net income received in the preceding calendar year from all sources by *every individual.*" (Italics ours.) Sections 1 and 201 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 303, imposed certain taxes upon the net income *"of every individual."* (Italics ours.) Subsequent Revenue Acts have likewise employed the phrase "of every individual." See Sections 210 and 211 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, the statute involved in the *Robbins case, supra,* and Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 39.

Nowhere in the Revenue Act of 1926 nor in any previous Revenue Act have there been set forth the proprietary rights which an individual must have in particular income to become liable for the tax thereon. The tax is imposed upon the income of individuals, and the application of this language to specific cases is to be made as they arise. In this process the *Robbins case* points the way. It does not hold that the principle of taxing income to the "owner" of the income is to be discarded, but rather that ownership in the statutory sense must be tested, in cases of community ownership, by the enjoyment of practical rights of ownership and not by words describing the interests of husband or

wife or of "the community" as "vested" or "expectant," "legal" or "equitable."

In its opinion in the *Robbins case* this Court said (p. 327):

> But the question before us is with regard to the power and intent of the Revenue Act of February 24, 1919, c. 18, Title II, Part II, Sections 210, 211; 40 Stat. 1057, 1062. *Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole.* Although restricted in the matter of gifts, &c., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. See *Garrozi* v. *Dastas,* 204 U. S. 64. His liability for his wife's support comes from a different source and exists whether there is community property or not. *That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole.* For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code, Sec. 167, so that the remedy for her failure to pay might be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the

> cases where they are liable under the law. Sec. 219. See Regulations 65, Art. 341. (Italics ours.)

Again, in the case of *Corliss* v. *Bowers,* 281 U. S. 376, this Court recognized that the legal estate was in the trustee and the equitable interest was in the grantor's wife, but nevertheless held the grantor to be taxable upon the income under Section 219 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), which provides for the taxation of the income from revocable trusts to the grantor. In holding this provision to be constitutional, the Court said (p. 378):

> But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power. The acquisition by the wife of the income became complete only when the plaintiff failed to exercise the power that he reserved. *Salstonstall* v. *Salstonstall,* 276 U. S. 260, 271.

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> *Chase National Bank* v. *United States*, 278 U. S. 327. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.
>
> Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate, it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.

Sections 210 and 211 of the Revenue Act of 1926, *infra*, p. 39, construed as the corresponding sections of the Revenue Act of 1918 were construed by the Court in the *Robbins case*, do not require the taxation of income to the individual having purely formal rights of ownership, their intention being to tax the person having the substantial right to exercise control and enjoyment of the income.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. The *Corliss case*, as previously indicated, involved the constitutionality of a statute taxing the income of a revocable trust to the grantor. Congress has also provided for the taxation of the income of trusts to the beneficiaries in cases where the income is dis-

tributable to them and for the taxation of the income of other trusts to the trustees. See Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), and the corresponding provisions of earlier statutes. This device for the taxation of the income from trusts was in effect prior to the decisions in the *Robbins case* and the *Corliss case*. Thus Congress itself did not intend that the imposition of a tax on the net income "of every individual" should always require that the holder of the legal title be taxed or that the holder of the equitable title be taxed, but rather that in proper cases the tax should be imposed upon the person having control of the income.

Not only have the *Robbins* and the *Corliss cases* established the principle that the individual is taxed upon income over which he can exercise rights of dominion and enjoyment rather than upon income to which he has a bare legal or equitable title, but the *Robbins case* has measured the rights of dominion and enjoyment by exceedingly practical tests. It is emphasized in that decision, for example, that the husband alone had the disposition of the fund; that he might spend it substantially as he chose, and that if he wasted it in debauchery, the wife had no redress; that his liability for his wife's support came from a different source and existed whether there was community property or not, and that the community property, while liable to be taken for his debts, was not liable to be taken for his wife's.

An application of the same principle was made in *Lucas* v. *Earl,* 281 U. S. 111, where it was held that an agreement, assumed to be valid, between husband and wife domiciled in California that each should have an equal joint interest in all their earnings could not operate to make one-half of his salary taxable to her as her income because he earned the income and had the right to collect it.

In any event, under these decisions it is settled that the rights of ownership which the person taxed must be able to exercise are substantial rights, and among such substantial rights are the rights of disposing of the income or the source of the income and the right to control the use of the income.

This test rests solidly upon the controlling purpose of the law to create a national system for the taxation of incomes without discrimination between taxpayers in the several States. The imposition of the tax "upon the net income of every individual" implies uniformity and equality in administration. But there can be neither unless the law looks through formalities of title to the rights and powers of individual taxpayers in controlling and disposing of income received. "The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." *Tyler* v. *United States,* 281 U. S. 497, 503. If married persons in the State of Arizona, because of their community of interest in property which either may acquire during wedlock,

are taxed upon their incomes at lower rates than married people in other States who enjoy substantially the same rights and powers with respect to the control and disposition of income, the purpose of the law will be defeated.

The family is the social and economic unit upon which the burden of the tax must fall and the injustice of such inequalities in the administration of the law is apparent. Unless the tax falls ratably upon all income over which the taxpayer exercises dominion and control, uniformity in administration is unattainable and inequality becomes inevitable. Such results are to be avoided if language permits. *Boston & M. R. R. Co.* v. *United States,* 245 Fed. 578 (C. C. A. 1st), certiorari denied, 255 U. S. 577; *United States* v. *Childs,* 266 U. S. 304, 309.

The test that he who has the power of disposition should bear the burden of the tax finds support in the general language of the statute and so to construe it effectuates the purpose of the law. Furthermore, this test is appropriate to the power and purpose of Congress in the imposition of taxes to deal with the substance of things regardless of formal legal fictions, a purpose which this Court has often recognized. *United States* v. *Robbins,* 269 U. S. 315; *Corliss* v. *Bowers,* 281 U. S. 376; *Tyler* v. *United States,* 281 U. S. 497; *Chase National Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339.

It is necessary, therefore, to examine the laws and the judicial decisions of the State of Arizona and to determine what substantial rights of ownership the husband and wife may exercise; that is, precisely what the husband may do and what he has a right to have done with respect to community property and income, and to make a like determination with regard to the wife.

III

Under the Laws and Judicial Decisions of the State of Arizona the Husband's Interest in the Community Income Is Such that He Should Properly Be Required to Report the Entire Amount in His Return; the Wife's Interest Is Not Such that She Should Be Permitted to Report One-Half of the Community Income in Her Return [6]

The decision must turn upon consideration of the laws of the State affecting community property and of the respective rights of the husband and wife to have control and dominion over such property and its income. But in approaching this consideration it is necessary to bear in mind that certain limitations upon the husband's power to deal, even with his own property, universally arise from the marital relationship and the husband's obligation to support his wife and make provision for her

[6] The following material to stars on p. 23 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

support after his death. Thus a limited right in the wife to bind the community by contracts for necessities is not a substantial right and should be disregarded, for it is comparable to the right which the wife had at common law to obtain necessities on the credit of the husband and to bind his separate property. *McFerren* v. *Goldsmith-Stern Co.*, 137 Md. 573, and cases cited.

Nor is a limited right to prevent a particular disposition of the community income or property by the husband important, for similar rights are enjoyed by wives in States which do not have the community-property system. There is, for example, a Utah statute providing that no assignment of the husband's wages shall be valid unless assented to by the wife in writing. Compiled Laws of Utah, 1917, Par. 4385. It would scarcely be urged that the possession of such rights by a wife would afford sufficient reason for taxing a part of the husband's income to the wife.

Nor would it be important if the wife could prevent her husband from disposing of more than one-half of the common property by will. This gives the wife no greater right (except as to the amount) than she has in Oklahoma where the husband is prevented from bequeathing away from his wife so much of his estate that she would receive less than what would be obtained by succession at law. Act of April 9, 1925, amending Section 11224 of the Compiled Statutes of Oklahoma, Session Laws, 1925, p. 30.

Similarly, in Minnesota (omitting reference to some unimportant exceptions and special provisions) the widow is entitled—subject to the payment of the husband's debts and expenses of administration—to one-third of the personal property then belonging to his estate and one-third of all real estate (other than the homestead, in which she is entitled to a life estate) of which he shall have been seized during coverture, the conveyance of which she has not assented to in writing. General Statutes, Minnesota, 1923, Sections 8718–8720, 8726.

So far as we have been able to ascertain every State in the Union which does not have a community property law, with the exception of North Dakota and South Dakota, makes some positive provision for the widow in relation to the husband's real estate, and even those States protect the wife's interest in the homestead. In practically all States provisions which give to the wife the assurance of receiving a certain proportion of the husband's real estate upon his death are accompanied by provisions which prevent him from conveying his real estate without her consent during his life in such a way as to defeat her dower or other statutory interest.

In the consideration of the local law, local "refinements of title" should be ignored and enquiry should be directed, in the language of the *Corliss case,* to "actual command" of the income taxed,

so that, in accordance with the decision in the *Robbins case,* the statutory intent that he who has all the power shall bear the burden may be accomplished. This enquiry will find conclusive answer in the statutes and prevailing decisions of the State, but the subject matter is of ancient origin and the precedents should be read with the prevailing conception of the husband's right of command over community property and income always in mind. For this purpose no better statement can be found than what was said by this Court in *Garrozi* v. *Dastas,* 204 U. S. 64, 78:

> The question, therefore, is this: Is the power of the husband, as the head and master and administrator of the community, in its nature so restricted that in the absence of express limitation he can, after the dissolution of the community, be called to account and compelled to return to the community money which he has actually expended during the existence of the community, because, in the judgment of a court, such expenses may be deemed to have been not suitable to his situation in life, extravagant, or even reckless? To answer this question in the affirmative would be to destroy the whole fabric of the community system as prevailing, not only under the Spanish and Porto Rican Codes but as obtaining in those countries of the continent of Europe and here where that system prevails. We need not consider whether the community was

derived from the Roman law, from an express provision of the early Saxon law, or from the ancient customary law of the continent.

For, however derived, the very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof. The purpose of the community, as expounded from the earliest times, whilst securing to the wife on the dissolution of the marriage an equal portion of the net results of the common industry, common economy, and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valueless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent. (See a very full citation of authority in Journal du Palais Repertoire, verbo, communauté, 739, 741, *et seq.*

In determining the authority of the husband as to the common property two considerations are essential: The character of the right of the wife to the common property during the existence of the marriage and the scope of the power of the husband during the same period.

With these preliminary considerations in mind, we turn to the statutes and judicial decisions of the State of Arizona which disclose the rights of the spouses to control and enjoy community property and its income.

* * * * * * * [7]

The statutory community property law of Arizona, which in 1875 replaced the Spanish law of community existing theretofore (see McKay on Community Property, 2d. ed., Section 1266), has no particularly distinguishing features. The statute was copied from the California statute, which it closely resembles. In many respects also its provisions are similar to those of Washington which are quoted and analyzed *in extenso* in the Government's brief in the case of *Poe* v. *Seaborn, supra.* The similarity of the Washington and Arizona statutes is commented upon in the case of *Cosper* v. *Valley Bank,* 28 Ariz. 373, 379.

Under the provisions of Section 3850 of the Arizona Revised Statutes of 1912 (*infra,* p. 45) the term "community property" includes all property acquired during coverture except that acquired by gift, devise, or descent. It does not, however, include the income, rents, issues, and profits of the separate property of husband and wife. Section 3848, *infra.* Nor does it include the earnings of the wife while living separate and apart from her husband. Section 3849, *infra.* In any contest be-

[7] See footnote 6, p. 18.

tween separate and community property, Arizona gives effect to the generally accepted presumption that all property acquired during coverture is community property. *Malich* v. *Malich,* 23 Ariz. 423; *Jones* v. *Rigdon,* 32 Ariz. 286.

Arizona also has failed to develop a distinctive philosophy of community ownership which is comparable to the "community entity theory" of Washington and to the "partnership" or "trust theory" of Texas. See brief for the Collector in *Poe* v. *Seaborn, supra,* and brief for the petitioner in *Geo. C. Hopkins, Collector of Internal Revenue,* v. *C. W. Bacon,* No. 84 on the docket of this Court for the present term.

The Supreme Court of Arizona has declared in a general way that the equitable interests of the husband and wife are equal, *La Tourette* v. *La Tourette,* 15 Ariz. 200; *Cosper* v. *Valley Bank, supra;* and in the latter case it said (28 Ariz. at p. 376) that the wife's interest was a "vested legal one, the same as the interest of any other partner in partnership property." There is at least one suggestion that it resembles ownership by tenants in the entirety. *La Tourette* v. *La Tourette, supra.* If this were a true analogy it would support our view that the husband's right of dominion and enjoyment is superior. Cf. *Tyler* v. *United States,* 281 U. S. 497. But the analogy breaks down upon comparison of substantial rights and obligations defined by statutes and authoritative decisions. This

is merely another illustration of the necessity of looking through false names to the substance of rights and powers.

Under the decision in the *Robbins case, supra,* the true test is what the husband has a right to do with the community property and income and whether the wife has actually any present right of control and enjoyment.

(A)

THE HUSBAND IS GIVEN COMPLETE AND EXCLUSIVE POWER DURING COVERTURE TO DISPOSE OF COMMUNITY PERSONAL PROPERTY AND TO BIND THE COMMUNITY BY CONTRACTS CONCERNING IT AND HE IS THE NECESSARY PARTY IN SUITS RELATING TO IT

Sections 403, 405, 3850 of the Arizona Revised Statutes, *infra.*
Stiles v. *Lord,* 2 Ariz. 154.
Gristy v. *Hudgens,* 23 Ariz. 339.
La Tourette v. *La Tourette,* 15 Ariz. 200.

Section 3850 of the Revised Statutes of Arizona, *infra,* gives the husband the unrestricted right to dispose of community personal property. He has the entire management and control with the absolute power of sale. See *Stiles* v. *Lord, supra.*

The case of *Gristy* v. *Hudgens, supra,* illustrates the extent of the husband's power. In that case the husband, as a member of an employees' benefit association, had named his wife beneficiary and subsequently changed the beneficiary before his death. The court held that the record did not

show that the insurance premiums were paid from community funds but concluded that even if they had been the wife could not complain. The court said (p. 348):

> Even if this court should assume that to be true, there is no showing or statement that such funds were paid in fraud of the wife's rights, and no showing that the wife had not received even more than her share of the community property. Furthermore, it is elementary that the husband has a right to dispose of the personalty belonging to the community as he sees fit, providing that he does not, by his disposal of the same, thereby defraud his wife.

It is thus established that the only restriction on the husband's control of personalty is that he can not dispose of it with the deliberate intention of defrauding his wife. See *La Tourette* v. *La Tourette, supra.* The same restriction exists in California and Washington.

Under Section 403 of the Arizona Revised Statutes requiring that the husband be joined with the wife whenever she is a party (except in suits affecting her separate property), the husband is a necessary party in all suits against the wife relating to community property. *Benson* v. *Hunter,* 23 Ariz. 132; *Hageman* v. *Vanderdoes,* 15 Ariz. 312. See also Section 405 of the Arizona Revised Statutes, *infra,* as to suits against husband and wife relating to the wife's contracts for necessities. It

is also well settled that the husband without joinder of the wife may be sued on his contracts with regard to community personalty. *First Nat. Bank of Mesa* v. *Reeves,* 27 Ariz. 508.

(B)

THE HUSBAND HAS THE MANAGEMENT AND CONTROL OF THE COMMUNITY REAL ESTATE AND MAY BIND THE COMMUNITY BY HIS CONTRACTS RELATING TO IT, EXCEPT THAT THE WIFE MUST JOIN IN ALL DEEDS AND MORTGAGES

Sections 2061, 3850, Arizona Revised Statutes, *infra.*

Pendleton v. *Brown,* 25 Ariz. 604.

Section 2061 of the Revised Statutes of Arizona, *infra,* provides that no "conveyance, transfer, mortgage or incumbrance" of any community real estate shall be valid unless executed and acknowledged by both husband and wife, except that unpatented mining claims may be conveyed, etc., by the one having title or the right to possession. Section 3850, *infra,* requires that the wife join in all deeds and mortgages affecting real estate except unpatented mining claims.

In the case of *Pendleton* v. *Brown, supra,* the Supreme Court of Arizona said (p. 617):

> The undoubted purpose of the statute is to make the husband head of the community, and to invest him with the power to manage and to dispose of the community assets. Conveyance of real estate requires the signature of the wife, but the proceeds acquired from the sale of such property ef-

> fected by means of the wife's signature is subject to the sole and exclusive control of the husband.

This view that the husband has the right to manage the community real estate subject only to the limitation as to conveyances, transfers, and mortgages has been challenged in *Schofield* v. *Gold,* 26 Ariz. 296, where it is suggested that the husband's and the wife's control over community real estate are equal. The latter case involved the question whether a wife could convey her interest in certain community real estate to her husband. It was held that she could do so notwithstanding the provision requiring the husband and wife to join in the conveyances of community real estate. It appears that the dictum that the husband and wife had equal rights of control was wholly unnecessary to the decision. The court might well have decided that it was not the purpose of the statute to prohibit such transfers and that it would be absurd to require the husband to join in a conveyance to himself. That was the view taken as to a husband's conveyance of a homestead to his wife in *Luhrs* v. *Hancock,* 6 Ariz. 340.

It is obvious that a husband's and wife's control over community real estate can not be equal because of the provisions of Section 3854, *infra,* giving the husband alone the right to make contracts which become a charge on all community property.

That their rights of control are not equal is further illustrated by the case of *Hall* v. *Weatherford,*

32 Ariz. 370, where it was held that a lease signed by the husband alone was valid, the wife being bound by the principle of equitable estoppel. In other words, such powers as the wife has in relation to the community real estate are negative, not positive. She is not a necessary party to every contract relating to community real estate. She has merely the power to prevent his conveying, leasing, or mortgaging the real estate without her consent, and if she fails to express her dissent his acts are effective. This principle is made clear by the decision in *Hood* v. *Fletcher,* 31 Ariz. 456, which arose over a conveyance executed before there was any provision requiring the wife to join with the husband in transfers of their community property, other than deeds and mortgages. In that case the husband's lease was held to be valid.

The husband, moreover, is in many cases the only necessary party in a suit affecting community real estate. *First Nat. Bank of Mesa* v. *Reeves,* 27 Ariz. 508, *supra.*

(C)

THE COMMUNITY PROPERTY IS LIABLE FOR ALL DEBTS INCURRED BY THE HUSBAND IN THE PROSECUTION OF COMMUNITY AFFAIRS AND THE PRESUMPTION IS THAT ALL DEBTS INCURRED BY HIM ARE CONNECTED WITH HIS MANAGEMENT OF COMMUNITY AFFAIRS

Section 3854, Arizona Revised Statutes, ***infra.***

First Nat. Bank of Mesa v. ***Reeves, supra.***

Cosper v. *Valley Bank,* 28 Ariz. 373.

It is at least doubtful whether the community property in Arizona is liable for the separate debts of the husband or for torts committed by him otherwise than in the prosecution of community affairs, notwithstanding that it was held in *Villescas* v. *Arizona Copper Co.*, 20 Ariz. 268, that community property might be seized and sold to pay a fine levied against the husband in a criminal action. That case has been apparently overruled by *Cosper* v. *Valley Bank, supra,* although in the latter case it was found that the debt there involved was a community debt.

Conversely, Section 3854 of the Revised Statutes of Arizona, *infra,* makes the community property liable for all community debts incurred by the husband. There is, moreover, a presumption that every debt incurred by him is a community debt. *Cosper* v. *Valley Bank, supra.*

While no decisions have been found which relate to torts of the husband, there is no reason to believe that a different rule would apply from that which applies to other obligations of the husband. The community property would no doubt be liable for the payment of damages for torts committed by the husband in the prosecution of community affairs, and there would be a presumption that a tort was committed in the prosecution of community affairs. See Point III (C) on pp. 29–31 of the argument in the brief for the Collector in the case of *Poe* v. *Seaborn, supra.*

(D)

THE WIFE ALONE CAN NOT MAKE ANY CONTRACT AFFECTING THE COMMUNITY PROPERTY OR SUE OR BE SUED IN REGARD TO IT EXCEPT THAT SHE MAY CONTRACT FOR NECESSITIES

Sections 403, 405, 3852, 3854, 3855, Arizona Revised Statutes, *infra.*

Richards v. *Warnekros,* 14 Ariz. 488.

Sections 3852 and 3854 of the Revised Statutes, *infra,* in unequivocal terms deny the wife the right to make contracts which will bind the community and give that power to the husband. In *Richards* v. *Warnekros, supra,* it was held that a chattel mortgage on community property executed by the wife alone was not enforceable, even though in giving it she was acting as agent for the husband. The only exception is that she may contract for necessities and make the community property liable. Sections 3855, 3856, *infra.*

In a suit relating to the wife's contracts for necessities, the husband and wife are both necessary parties. Section 405 of the Revised Statutes, *infra.* In other cases where she is a proper or necessary party in a suit affecting community property, it is required that the husband also be joined. For example, in *Garver* v. *Thoman,* 15 Ariz. 38, it was held that a husband was a necessary party in an action to recover on a contract for services entered into by the wife, and that the wife, although a proper party, was not a necessary party. In *Ben-*

son v. *Hunter,* 23 Ariz. 132, *supra,* it was held that in an action instituted against a married woman for work and labor, her administrator being subsequently substituted, the husband should be joined. In *Hageman* v. *Vanderdoes,* 15 Ariz. 312, *supra,* the husband was held to be a necessary party in an action relating to the wife's tort. It is of interest that the *Hageman case* fails to show whether the community property was liable for the payment of damages. The case merely holds that the husband's common law liability for the torts of the wife has been abrogated but that the husband was a necessary party because the action did not come within any of the exceptions in the statute requiring him to be joined in suits against the wife. No doubt the better view is that the community property is not liable for any tort of the wife, just as it is not liable for her debts other than debts incurred for necessities.

Attention is directed to the fact that there is no Arizona statute which provides that upon abandonment by the husband the wife acquires the right of control over community property and that no decision to that effect has been found. It appears that the wife's situation in this respect is different from that in the States of Texas and Washington. She may, however, maintain a suit against her husband for support under those circumstances. Section 3881 of the Revised Statutes, *supra.*

(E)

THE WIFE CAN NOT COMPEL HER HUSBAND TO GIVE HER ANY PART OF THE COMMUNITY INCOME OR PROPERTY WITHOUT SECURING A DIVORCE; IF SHE DOES SECURE A DIVORCE, SHE DOES NOT NECESSARILY RECEIVE ONE-HALF OF THE COMMUNITY PROPERTY

Sections 3862, 3866, 3869, 3881–3885 of the Revised Statutes, *infra.*

No case has been found in which the Supreme Court of Arizona has held that by a suit in equity or otherwise the wife can remove one-half of the community funds from her husband's control because of his dissipation or mismanagement of them. It is true that if he abandons her or commits any act which would be a cause for the granting of an absolute divorce, she may, without applying for a divorce, maintain an action against her husband for support. Sections 3881–3885, *infra.* This relief is entirely independent of the existence of any community property. In fact, any judgment against the husband constitutes a lien on his separate property. Section 3883, *supra.*

It is only in connection with proceedings for a divorce that a division of the community property may be secured or that the wife may prevent her share of the community funds from being dissipated by her husband. Section 3866 of the Revised Statutes, *infra,* enables her by injunction to restrain him from disposing of any part of the community property at any time during an action for divorce. Section 3862, *infra,* provides that the

court in pronouncing a decree of divorce shall order a division of their property in such a way as seems just and right with due regard for the rights of the children and of the parties. See also *McFadden* v. *McFadden,* 22 Ariz. 246. Section 3869, *infra,* authorizes the court to make a division of the community property between the parties "or in lieu thereof, direct the husband to pay to the wife such amounts as may be necessary for the support and maintenance of the wife, and the minor children of the parties whose custody may be awarded to the wife." Alimony may also be ordered to be paid during the pendency of the action. Section 3867, *supra.*

It is evident that these provisions are designed to make adequate provision for the wife's support rather than to protect her interest in any definite portion of the community property. They have been so construed by the Supreme Court of Arizona. *McFadden* v. *McFadden, supra.*[8]

(F)

THE HUSBAND EXERCISES SUBSTANTIALLY ALL OF THE RIGHTS OF CONTROL AND ENJOYMENT OVER THE COMMUNITY PROPERTY AND INCOME AND SHOULD BEAR THE BURDEN OF THE TAX UPON IT

From the foregoing, it must be concluded that as a practical matter the wife's interest in the com-

[8] If the court fails to make a division of community property the parties thereafter hold it as tenants in common. *Le Baron* v. *Le Bæron,* 23 Ariz. 560.

munity property is no more than a right to devise by will or to receive upon the dissolution of the community one-half of the then existing community property. If the community is dissolved by divorce, moreover, she may or may not receive one-half. She can not interfere with the husband's contracts or bind the community by her own contracts except as to family necessities.

On the other hand, the husband, in addition to having a vested interest in community property equal in all respects to the wife's interest, has full powers of management as to community personalty and can enter into any contract regarding community real property except that he must be joined by his wife in conveying, mortgaging, or leasing real estate. The only material restriction which exists even in theory is that he can not intentionally defraud his wife.

This limitation does not confer any right upon the wife, for she has no way of removing her share of the community property from his control. If he abandons her or gives her cause for divorce, she may sue him for support, without applying for a divorce, or apply for a divorce and ask for an injunction to restrain him from dissipating the community funds. If she takes the first course, the action is entirely independent of the existence of community property. If she takes the second and ultimately secures a divorce, the court may award alimony or such division of the property as " shall seem just and right."

While the community property is apparently not made liable for the separate debts of the husband or wife or for their torts, it is made liable for the obligations of the husband incurred in the management of the community affairs and not for those of the wife except as to her contracts for necessities. Presumptively, the husband's contracts are community contracts. He also is the necessary party in all suits brought by the community and in suits against it.

Clearly, the husband in Arizona has very nearly all of the present power over the community income. Having such power, whether he is technically the sole owner or not, he exercises all of the rights of ownership and is chargeable with the tax imposed not upon him but upon that income. It should be noted that all of the income involved in this case with the exception of $42.45 consisted of salary received by the appellee for personal services. In the case of *Lucas* v. *Earl,* 281 U. S. 111, this Court held that the husband could not by assignment create in his wife such title to his salary as would make it improper to tax his entire salary to him. In this case, also, the wife has an interest in his salary upon its receipt, but is without the right to collect or spend it. The proper and reasonable construction of the Act is to require him to pay the tax.

The practical difficulties incident to the collection of the tax, if it is to be assessed against the wife,

are obvious. *United States* v. *Robbins, supra.* The wife can not pay the tax assessed against her out of the income taxed. She has no power to appropriate any of the community property to the payment of the tax.

CONCLUSION

It is therefore urged that the judgment of the District Court for the District of Arizona should be reversed.

Respectfully submitted.

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APPENDIX

UNITED STATES STATUTES

The Revenue Act of 1926, c. 27, 44 Stat. 9, 21–22, 37, 130, provides in part as follows:

SEC. 210 (a). In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 1½ per centum, and upon the next $4,000 of such excess amount shall be 3 per centum; * * *. (U. S. C. App., Title 26, Sec. 951.)

SEC. 211 (a). In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows * * *. (U. S. C. App., Title 26, Sec. 952.)

SEC. 223 (a). The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. (U. S. C. App., Title 26, Sec. 964.)

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. App., Title 26, Sec. 964a.)

Arizona Statutes

The Revised Statutes of Arizona of 1913 (Civil Code)[9] provide in part as follows:

TITLE 6

403. When a married woman is a party her husband shall be joined with her except:

(1) When the action concerns her separate property she may sue or be sued alone.

(2) When the action is between herself and her husband, she may sue or be sued alone.

404. If a husband and wife be sued together the wife may defend in her own right.

405. The husband and wife shall be jointly sued for all debts contracted by the wife for necessaries furnished herself or children.

865. When a person dies leaving a widow or minor children, the widow or children until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be allowed by the superior court, or the judge thereof.

866. Upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor

[9] The Revised Statutes of Arizona of 1913 have been superseded by the Revised Code of 1928; but the references to this brief are to the earlier compilation, since it was in force in 1927, the tax year in question.

children of the decedent, all the property exempt from execution, including the homestead, selected, designated, and recorded; provided, that such homestead was selected from the common property, or from the separate property, of the persons selecting or joining in the selection of the same. If none has been selected, designated, and recorded, or, in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife, and the minor children; or if there be no surviving husband or wife, then for the use of the minor children, in the manner provided by law, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent.

867. If the amount set apart be insufficient for the support of the widow and children, or either, the court or the judge thereof must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate; which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration.

868. Any allowance made by the court or judge, in accordance with the provisions of this chapter, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

869. When property is set apart to the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow or surviving husband, the whole belongs to the minor child or children. If the property set apart be a homestead, selected from the separate property of the deceased, the court can set it apart only for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order.

1100. [See amendment at end of statutes, *infra*, p. 49.]

1102. Where two or more persons hold an estate, real, personal or mixed, jointly, and one joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owners, but shall descend to and be vested in the heirs and legal representatives of such deceased joint owner, in the same manner as if his interest had been severed and ascertained.

TITLE 8

2058. Married women of the age of eighteen years or upwards may convey and transfer lands or any estate or interest therein, vested in or held by them in their own right, without being joined by the husband in such conveyance, as fully and perfectly as they might do if unmarried.

2059. Married men of the age of twenty-one years or upwards may convey and transfer lands or any estate or interest therein, vested in or held by them in their own right, without being joined in such conveyance by the wife, as fully and perfectly as they might do if unmarried.

2060. The homestead of a family shall not be sold and conveyed by the owner, if a married man, without the consent of the wife. Such consent shall be evidenced by the wife joining in the conveyance, and signing her name thereto; and also by her acknowledgment thereof, taken and certified to before a proper officer.

2061. No conveyance, transfer, mortgage or incumbrance of any real estate which is the common property of husband and wife, or any interest therein, shall be valid unless such conveyance, transfer, mortgage or incumbrance shall be executed and acknowledged by both the husband and wife. But the provisions of this section shall not apply to unpatented mining claims, which may be conveyed, transferred, mortgaged or incumbered by the one in whose name the title or right of possession of any such mining claim may be, without the other joining in such conveyance, transfer, mortgage or incumbrance.

2062. Either husband or wife may authorize the other, by power of attorney in writing, executed and acknowledged in the manner as conveyances of real property, to sign, execute, acknowledge and deliver in the name and on behalf of the one executing the power any conveyance, transfer, mortgage or other instrument, affecting the separate property, or any interest therein, of the one

making such power, or the community property or any interest therein, and any instrument executed under such power shall be as valid as if made by the one making such power in person.

TITLE 32

3848. All property, both real and personal, of the husband, owned or claimed by him before marriage and that acquired afterward, by gift, devise or descent, as also the increase, rents, issues and profits of the same, shall be his separate property, and all property, both real and personal of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase, rents, issues, and profits of the same, shall be her separate property.

3849. The earnings and accumulations of the wife and of her minor children in her custody while she has lived or may live, separate and apart from her husband, shall also be the separate property of the wife.

3850. All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children, while she has lived or may live, separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture personal property may be disposed of by the husband only; but husband and wife must join in all deeds and mortgages affecting real estate except unpatented mining claims, which may be conveyed by the husband or wife only, as provided by the laws of this state relating to conveyances; provided that either

husband or wife may convey or mortgage separate property without the ot' .r joining in such conveyance or mortgage.

3851. Married women shall have the sole and exclusive control of their separate property, and the same shall not be liable for the debts, obligations or engagements of the husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by them in the same manner and with like effect as if they were unmarried.

3852. Hereafter married women shall have the same legal rights as men of the age of twenty-one years and upwards, except the right to make contracts binding the common property of the husband and wife, and shall be subject to the same legal liabilities as men of the age of twenty-one years and upwards.

3853. The separate property of the husband or wife shall not be liable for the debts of the other contracted before marriage.

3854. The community property of the husband and wife shall be liable for the community debts contracted by the husband during marriage, except in such cases as are specially excepted by law.

3855. The wife may contract debts for necessaries for herself and children upon the credit of her husband, in which case she and her husband must be sued jointly.

3856. Upon the trial of any suit as provided for in the preceding section, the court shall decree that the execution be levied, first upon the common property, second upon the separate property of the husband, third upon the separate property of the wife.

3862. [See amendment at end of statutes, *infra*, p. 50.]

3865. On and after the day on which the action for divorce shall be brought it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the property belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved, to the satisfaction of the court that such alienation was made with a fraudulent view of injuring the rights of the wife.

3866. At any time during a suit for divorce, the wife may for the preservation of her rights, require an inventory and an appraisement to be made of all community property, and all her separate property, which is in the possession of the husband, and may obtain an injunction restraining him from disposing of any part thereof in any manner.

3867. During the pendency of such action the court may in its discretion require the husband to pay as alimony any money necessary for the prosecution of the action, or for attorney's fees, or for the support and maintenance of the wife, or minor children of the parties, and the court may in its discretion order that execution issue therefor.

3868. Pending any suit for divorce the court may make such temporary orders respecting the property of the parties, or either of them, or the custody of the children of the parties as may from time to time be deemed necessary.

3869. In the final judgment in any such action the court may, in addition to the division of the common property of the parties, or in lieu thereof, direct the husband to pay to the wife such amounts

as may be necessary for the support and maintenance of the wife, and the minor children of the parties whose custody may be awarded to the wife, as may be deemed necessary or proper, and may direct that said amount may be paid in one sum, or installments, and may enforce the payment thereof by execution.

3881. When the husband wilfully deserts or abandons the wife or whenever any facts exist which would be cause for the granting of an absolute divorce, the wife may, without applying for either an absolute or a limited divorce, maintain in the superior court an action against the husband for the permanent support of herself, or of herself and children.

3882. Such proceedings shall be commenced and conducted in the same manner as actions for a divorce from the bonds of matrimony; and the court, upon motion, may award such sum for counsel fees and temporary alimony during the pendency of the action as the circumstances and situation of the parties appear to warrant.

3883. The judgment in any such action shall provide for the payment by the husband to the wife in one sum, or from time to time, such amount as may be necessary for the support of the wife or the wife and minor children, and such amount may be adjudged to be a lien upon any separate property of the defendant, and may be enforced by execution as other judgments.

3884. The court may at any time, or from time to time, after the entry of final judgment in such case amend, alter or change the provisions of such judgment with respect to the sum or sums to be so paid as the circumstances of the case may require.

3885. No action for separate maintenance, nor any judgment rendered therein, shall bar the plaintiff from the right to maintain an action for an absolute divorce upon the same grounds upon which the action for separate maintenance is based.

3886. An appeal may be taken to the supreme court from any judgment of the superior court in any action for absolute or limited divorce or separate maintenance, and from any order directing the payment of alimony, temporary or permanent, subject to the provisions of law relating to appeals in civil actions; provided, that an order directing the payment of money for the support or maintenance of the wife, or the minor child, or children, shall not be suspended or the execution thereof stayed pending any such appeal.

Section 1100 of the Arizona Revised Statutes of 1913 was amended by the Act of February 10, 1921, Arizona Session Laws, Regular, 1921, p. 6, as follows:

1100. Upon the death of the husband one half of the community property shall go to his surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his descendants, equally, if such descendants are of the same degree of kindred to the decedent, otherwise according to the right of representation; and in the absence of both such disposition and such descendants, goes to the surviving wife. Upon the death of the wife one half of the community property shall go to her surviving husband, and the other half is subject to the testamentary disposition of the wife, and in the absence of such disposition goes to her descendants,

equally, if such descendants are of the same degree of kindred to the decedent, otherwise according to the right of representation, and in the absence of both such disposition and such descendants, goes to the surviving husband.

SECTION 2. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

Approved February 10th, 1921.

Section 3862 of the Arizona Revised Statutes of 1913 was amended by the Act of March 17th, 1919, Arizona Session Laws, Regular, 1919, p. 98, as follows:

Before pronouncing a decree of divorce from the bonds of matrimony, the court shall require evidence of the property and estate of the parties, and shall order such division of said property and estate as to the court shall seem just and right, having due regard for the rights of each party and their children, if any. Nothing herein contained shall be construed to compel either party to divest himself or herself of the title to separate property. The court may, however, fix a lien upon the separate property of either of the parties to secure the payment of any interest or equity that the other party may have in or to such separate property, or any equity that may arise in favor of either party out of property matters during the existence of the marriage relation, or to secure the payment of an allowance for the support and maintenance of the wife or minor children of the parties.

The decree of divorce shall specifically describe the real estate of the parties affected by the decree, situated in this State, and any such decree affect-

ing the title to real estate shall be recorded in the office of the County Recorder of the County, of each county in which any such real estate is situated. Any separate property of either of the parties of which no disposition is made in the decree shall remain the separate property of such party, free of all claims of the other party, and any community property concerning which no provision is made in the decree shall be from the date of such decree, owned and held by the parties as tenants in common, each owning and holding an undivided one-half interest therein.

Approved March 17th, 1919.

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FILE COPY

No. 106

OCT 1

In The United States
Supreme Court

OCTOBER TERM, 1930

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

vs.

I. B. KOCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

OPINIONS BELOW

This case comes before the Court on certificate from the United States Circuit Court of Appeals for the Ninth Circuit. The United States District Court for the District of Arizona rendered no opinion.

JURISDICTION

Jurisdiction is conferred by Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

The facts of the case, and the two questions certified by the United States Circuit Court of Appeals for the Ninth Circuit are correctly stated in the brief for the Collector. However, we desire to make this further statement and explanation of the issues involved.

This is one, the fourth on the docket of the Court, of four test cases, designed to determine the right of husband and wife in the States of Washington, Texas, Louisiana and Arizona, respectively, to divide between them community income and each return one-half thereof, for federal income tax purposes. The history of the controversy as a whole, and the course of events leading up to these test cases, is fully set forth in the joint brief filed on behalf of the four taxpayers. We will here advert only to the situation as it peculiarly affects the Arizona taxpayer.

Arizona was one of the states to which the opinion of the Attorney General of the United States, of February 26, 1921, was expressly directed. Pursuant to that opinion, and Regulations of the Treasury Department based thereon, husbands and wives domiciled in Arizona, have ever since been making

separate returns of their respective shares of community income. As will be seen from the joint brief, and consideration of the three preceding cases, disturbance of this situation was precipitated by the decision of this Court in Robbins vs. United States, 269 U. S. 315, holding that the wife's interest in the community income under the system in force in California was not substantial enough during the existence of the community to entitle her to return separately half of it as her income. Following that decision, the Attorney General rendered his further opinion, under date of July 16, 1927 (35 Opinions of Attorney General, 265), in which he expressed doubt as to what conclusions the courts might reach with respect to the state of the law in the other community property states, concededly different than that of California.

Throughout this controversy, we in Arizona have taken this 1927 opinion of the Attorney General as definitive of the contention of the federal government as to Arizona income taxpayers and the issues here involved. This opinion was rendered a year and a half after the decision in the Robbins case, and after the questions involved had been exhaustively briefed by counsel for the respective community property states. It represented, we were led to believe, and still feel, the result of a most exhaustive investigation of the entire controversy, as affecting the community property states other than California. Further reference to this opinion will be made in our argument, but at this point, in stating the case,

we desire to make use of the following language of the Attorney General, contained in his opinion of July 16, 1927:

> "The questions involved are not matters of construction of the Revenue Acts of the United States, but involve the nature of the wife's interest in the community income. The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income taxes upon the community income if that income belongs to him, and to prevent the wife from returning a share of the community income as her own unless that share belongs to her. Neither the opinions of the Attorney General nor the rulings of the Treasury Department have been based on any interpretation of the Acts of Congress. The nature and extent of a wife's interest in community income in any of the states is to be determined from the statutes and decisions of the State. In determining the nature of an interest in community income created by State law, it is necessary for the Federal Courts to accept the decisions of the State Courts construing the statutes creating the interest and to determine from the statutes and decisions of the State Courts the intrinsic nature of that interest."

Pursuant to this opinion, and the resulting action of the Treasury Department, a representative Arizona taxpayer initiated this case. Its purpose was, and is, to determine, from the Arizona statutes and decisions, to whom community income in this State belongs. The issue is clearly confined to the deter-

mination of the "intrinsic nature of a wife's interest in the community income."

SUMMARY OF ARGUMENT

Our fundamental proposition is, of course, that the wife, in Arizona, owns one-half of all community property and, accordingly, one-half of the community income, as it accrues. In urging this proposition, which seems to us quite elementary, we are not compelled to resort to "adjectives used by State courts in an effort to describe the nature of the wife's interest," against which the Attorney General warned in his 1927 opinion. We have to advance in support of our position a basic statute in force for more than fifty years; and while there is no such volume of decision in Arizona as exists in the older and more populous states, the Supreme Court of Arizona has clearly and accurately stated the essential nature and extent of the respective interests of the spouses, and set forth with precision the various incidents and attributes of the community property system as it has always prevailed in Arizona. As distinguished from that for the Collector, our argument will be directed largely to the basic nature of community property rather than the incidents of the system; to what it is, rather than how it necessarily operates because one spouse is a woman.

We will show the Court, further, that community property, as known in Arizona, is something more than a law; that it is an institution. That it is not

fiction, but fact. And that the present controversy is very largely the result of superficial examinations of our property system by those to whom it is strange and, accordingly, non-existent. We will point out, in our argument, the several respects in which the brief for the Collector offends in this respect. It must be apparent to this Court that this fundamental law of property, existing as it has in seven states since their founding, is a thing of substance, and worthy of a full and fair analysis for what it is—not what its *necessary* limitations may be.

Insofar as it treats of the state of Arizona law, the brief for the Collector is pointed, solidly, to those incidents and appurtenances of the system which can be held out as limitations of the wife's title to her one-half of the community property. In the summary of their argument, counsel for the Collector say:

> "The question, therefore, is not whether the husband or wife has a 'vested' or 'expectant' or 'legal' or 'equitable' title to the community property under the laws of Arizona, but what rights of dominion and enjoyment he or she may exercise."

The argument then proceeds to the point, not of who owns the property, but to what extent each owner exercises his rights of ownership and enjoyment. The Government says, in effect: "By your law, the wife owns one-half of all that the marital community acquires, but since she cannot do with

it everything that the husband does with his half, she cannot be said to own it at all." In short, the argument is that because we have reconciled our community property system to the fundamental function of the marital community, and made it workable, we have destroyed it.

The Supreme Court of Arizona has fully answered this argument in the case of La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426, which stands as our leading case on all community rights and obligations. This case, in a full exposition of community property, lays down the rule for Arizona that the titles of husband and wife are in all respects equal. It recognizes that the wife in her status is as much an agent in the acquisition as the husband. And finally, it disposes of the "dominion and control" argument by pointing out that the powers of the husband are not in recognition of any superior right or title, but by virtue of an agency for which he is deemed better qualified than the wife.

ARGUMENT

I

The Wife in Arizona Has a Present Vested Title in Community Property Equal in All Respects to That of the Husband, and Community Income Vests Equally Between Them As It Accrues.

The Arizona law of the rights of married persons in property is contained in Chapter III, Title 32,

Revised Statutes of Arizona, 1913, Civil Code. The relevant portions are correctly set forth in the appendix to the brief for the Collector. The statute provides what shall be deemed the common property of the husband and the wife and what the separate property of either, and prescribes the respective rights of the spouses. Paragraph 3850, defining community property, provides:

> "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children, while she has lived, or may live, separate and apart from her husband, shall be deemed the common property of the husband and wife * * * ."

In the lower courts, government counsel contended that this language, as interpreted by Arizona decisions, conferred upon the wife no other or higher status than that of the California wife under the statutes and decisions construed by this Court in the Robbins case. This position appears now to be abandoned. Title II of the argument in the Collector's brief in this Court maintains only that the wife's interest "is not such that she should be permitted to report one-half of the community income in her return." Which, of course, begs the question of what the wife's interest really is.

To the superficial inquirer, embarking with the idea that community property is a mere fiction, the property rights of the respective spouses, under the

above statute, may possibly be obscure. The statute, of itself, is not complete; for instance, in the outstanding respect that the shares of the spouses in the common property are not prescribed. Obviously, this is because the statute set up no new or overturning system of property holding, but merely perpetuated a system, native to the soil of these states, and, in Arizona, perpetuated the Spanish law of community as it had endured for centuries. Viewed in this light, the laborious efforts of government counsel to discover a "distinctive philosophy" of Arizona community property, and to build it up backwards from its application to everyday transactions of the marital community, are understandable.

In the La Tourette case, supra, the Supreme Court of Arizona has most plainly announced what community property is, and how it operates to facilitate, rather than impede, the function of the family in which the State is so vitally interested. This outstanding decision is hastily disposed of by government counsel, who cite it in their brief as authority for the proposition "that the equitable interests of the husband and wife are equal." As will be seen, it nowhere deals with equitable interests. When the federal government undertakes to discover, for its purposes of taxation, the owner of the wife's share of Arizona community property, it seems to us the answer is to be found in the following language of this La Tourette case:

"The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal. Its policy plainly expressed is to give the wife in this marital community an equal dignity, and makes her an equal factor in the matrimonial gains. It recognizes that property acquired during marriage by community funds *or the labor and industry of either spouse,* except what is earned by the wife and her minor children while she has lived or may live separate and apart from the husband, *is the common property of the husband and wife.* All that either the husband or wife or both may acquire during the existence of the marriage, otherwise than is specifically excepted, is an acquest of the community, and the presumption in all doubtful cases is strongly in favor of treating that which either spouse may own as community property. It recognizes that the wife in her station is as much an agency in the acquisition as the husband, and is entitled to just as great an interest. It is altogether fitting and proper that woman should be thus esteemed by the law in fixing her status if she is to be considered in fact as well as in theory an essential factor in the economy of the marital community. It is true that during the coverture the personal property belonging to the community may be disposed of by the husband only; but it is equally true that no sale or encumbrance of the real estate may be made by the husband without the consent of the wife. She must join in all deeds

and mortgages affecting real estate, except unpatented mining claims." (Italics ours).

If it be essential that Arizona here commit itself to a "distinctive philosophy" in respect of its community property, one is here supplied. The wife has a title to her share of the acquests of the community equal to that of the husband to his. If comparison with another relationship be desired, it is supplied in the later case of Cosper v. Valley Bank, 28 Ariz. 373, 237 Pac. 175, where the wife's title is described as a "vested legal one, the same as the interest of any other partner in partnership property."

We believe the foregoing discloses sufficiently the state of the Arizona law as it prescribes the title of the wife to her share of the community property. It seems not seriously to be controverted in the government brief, that she is the owner of one-half of such property and, accordingly, the community income, as it accrues. But it is there asserted, that upon the authority of the Robbins case and Corliss v. Bowers, 281 U. S. 376, the income of the wife may nevertheless be taxed to the husband because he exercises, it is alleged, "all the substantial rights of dominion and enjoyment." The rights and powers of the wife, in respect of her half of the community income, are variously described as "formal", "unimportant" and "technical". Apparently, the argument is designed to place us in the position of advancing a technical argument to evade taxation. What could be more technical than the contention

which concedes a legal title in the wife, yet for the purposes of this case considers not the fact or substance of such title, but only the restrictions necessarily surrounding her enjoyment of it? It is the outstanding example of the failure of government counsel to comprehend the basic nature of community property.

II.

The Powers of the Husband Over Community Property are in Recognition, Not of a Superior Interest or Title, But of the Necessity of Subordinating the Exercise of Property Rights to the Family Function.

The brief for the Collector is almost entirely devoted to the respects in which the husband's and the wife's exercise of control over the community property are not equal. The conclusion is reached that the husband in Arizona has very nearly all of the present power. With one important exception, the Arizona decisions are considered. And while in general, the substance of community property is not drawn from the cases, the incidents of the system are in most cases fairly set down. There can be little dispute as to what powers of control and disposition are exercised respectively by the husband and the wife in Arizona; and in lieu of a discussion of the many cases, we will schedule all of the various rights, restrictions and other incidents of the system, including those treated in the brief for the Collector.

1. Community property includes all property acquired during coverture, except by gift, devise or descent and the earnings of the wife while living apart.

Par. 3850, R. S. A., 1913, C. C.

2. It does not include income from the separate property of either spouse.

Par. 3848, R. S. A., 1913, C. C.

3. In any doubtful case, acquests during coverture are presumed to be community.

Malich v. Malich, 23 Ariz. 423, 204 Pac. 1020.

Cosper v. Valley Bank, 28 Ariz. 373, 237 Pac. 175.

4. The interest of each spouse in one-half of the property is a vested legal one, the same as the interest of any other partner in partnership property.

La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426.

Pendleton v. Brown, 25 Ariz. 604, 221 Pac. 213.

Cosper v. Valley Bank, supra.

Hall v. Weatherford, 32 Ariz. 370, 259 Pac. 282.

Forsythe v. Paschal, 34 Ariz. 380, 271 Pac. 865.

Schofield v. Gold, 26 Ariz. 296, 225 Pac. 71.

5. The husband has the management and control and right of disposition of all community property during coverture; provided that no sale or encumbrance of real estate may be made without the consent of the wife.

Par. 3850, R. S. A. 1913, C. C.

Pendleton v. Brown, 25 Ariz. 604, 221 Pac. 213.

6. The husband's right of control and disposition is subject to the restriction that it may not be exercised to defraud the wife of her one-half, and the remedy of the wife for a disposition in fraud of her rights or to defeat her interests, is found in the general law of agency.

Gristy v. Hudgens, 25 Ariz. 339, 203 Pac. 569.
La Tourette v. La Tourette, supra.
Cosper v. Valley Bank, supra.

7. The husband is a necessary party to all suits affecting the community property.

Benson v. Hunter, 23 Ariz. 132, 202 Pac. 233.

8. The community property is liable for all community debts contracted by the husband during marriage, and by the wife for necessaries; but is not liable for the separate debts of either spouse, incurred either before or during coverture.

Par. 3854 - 3855, R. S. A. 1913, C. C.
Cosper v. Valley Bank, supra.
Forsythe v. Paschal, supra.

9. Each spouse has unlimited testamentary power over his or her half of the property; and in the absence of testamentary disposition, the property passes to the descendants of the deceased spouse.

Par. 1100, R. S. A. 1913, C. C.
Pauley v. Hadlock, 21 Ariz. 340, 188 Pac. 263.
Wilson v. Sullivan, 24 Ariz. 124, 206 Pac. 222.

10. In divorce proceedings, the Court may, "in addition to the division of the community property of the parties, or in lieu thereof, direct the husband to pay to the wife such amounts as may be necessary for support, etc. * * *".

Par. 3869, R. S. A. 1913. C. C.

11. Each spouse may convey to the other, by deed executed by him or her alone, his or her interest in community real property.

> "This court has said in several opinions that a deed from the husband to the wife conveying his interest in the community real estate is valid, and, since it was the purpose of the legislature in the enactment of the community property law as it now stands to place the husband and wife upon an absolute equality so far as the alienation and encumbrance of community real estate is concerned, it follows logically and necessarily that she may convey her interest in such property to him, for, even though he is empowered to dispose of the common personalty during coverture and to contract community debts for which the community property may be liable, he is given no greater right, no fuller power to deed or mortgage community real estate, than she. To hold that he can convey to her, but that she cannot convey to him, finds no support in a statute intended to place them upon an equal footing in this respect." Schofield v. Gold (supra) p. 305.

Government counsel, in their zeal, have seized upon those of the above provisions which they could construe as restrictions upon the wife's use and en-

joyment of her share of community property, and proceeding therefrom, have sought to negative the title positively conferred upon her by the statutes and decisions above cited. Had they, instead, started with the title conferred upon her by our statute, which, if they found it difficult of definition, is in any event equal to that of her husband, the restrictions placed upon the wife would readily have reconciled themselves. That the powers of the spouses over the common property are not equal is quite apparent. But to say that because they are not, half of the property cannot belong to the wife, is to indulge that misconception of the community property system which this Court long ago cleared away in Warburton v. White, 176 U. S. 484:

> "It is a misconception of that system to suppose that, because power was vested in the husband to dispose of the community property acquired during marriage, as if it were his own, therefore by law the community property belongs solely to the husband. The conferring on the husband of the legal agency to administer and dispose of the property involves no negation of the community, since the common ownership would attach to the result of the sale of the property. * * * This right being vested in him not because he was the exclusive owner, but because by law he was created the agent of the community."

In very similar terms, the Supreme Court of Arizona has defined the nature and extent of this agency with which the husband is clothed:

> "The law, in giving this power to the husband during coverture to dispose of the personal property, does not do this in recognition of any higher or superior right that he has therein, but because the law considers it expedient and necessary in business transactions affecting the personalty to have an agent of the community with power to act. So it has clothed the husband with this agency, deeming him the best qualified for the purpose, but limiting such agency to the personalty and during the period of coverture. And this agency to dispose of the community personalty may not be executed by the husband to defraud his wife, for in one way or another she would have a remedy for a disposition by the husband in fraud of her rights, or made with the intent and purpose of defeating her interest. And further, this power of the husband to dispose of the personal property of the community is limited to the period of coverture, and does not extend to his disposal thereof by will, but he is restricted in the disposal by will to his one-half interest."
>
> La Tourette v. La Tourette, Supra.

In the light of this language, it is readily seen that the federal government, in its presentation of the Arizona community property system, has simply reversed the cart and the horse. We do insist that one-half of the property belongs to the wife, for taxation as well as any other purpose, but at the same

time, we do concede that the primary interest of the State in the marriage status is the protection and preservation of the family as a unit, and of the minor children. Accordingly, the State has provided, for administrative purposes, an agency by and through which the community may function. As this Court recognized in the Warburton case, supra, the conferring on the husband, as the better qualified, of such an agency, involves no negation of the wife's title to her half of the property. If for no other reason, this is so because her ownership attaches throughout any transaction to which the agent may subject the property.

Further consideration of the Arizona decisions treated in the Collector's brief seems unnecessary. They are there cited to the point that the powers of the spouses are unequal, which cannot be denied. We think the attributes of the Arizona system, as listed above, comprise a fair statement of what community property is in this State, and how it has been reconciled to the functioning of the family. There is one case, however, not cited in the opposing brief, which gives additional force to our argument upon this point. Forsythe v. Paschal, 34 Ariz. 380, 271 Pac. 865, involved an attempt of a creditor to subject community property to payment of the wife's debt contracted before marriage. An ingenious argument was advanced by the creditor, but the Court held that the community estate may not be subjected to the individual debts of either spouse contracted

before marriage any more than those contracted after marriage.

In the course of the opinion, the Court further stated the general nature of the marital relation in Arizona, affirming and supplementing what has been quoted, supra, from the La Tourette case. Particularly, there is stated the analogy of the marital status to that of a partnership, and the primary nature of the State's interest in the family unit. We think the following language from this Forsythe decision, when considered with that of the La Tourette case, fully meets the government's contention, as we understand it:

"Under our law, therefore, the status of marriage is more analogous to that of a partnership than to any other status known. It has, however, at least one important quality not possessed by the ordinary partnership. Both, it is true, arise out of a voluntary contract, and in both the individual rights of the parties in the partnership property are subordinate to the rights and liabilities of the partnership. In the ordinary partnership, however, the state as such is not interested. The partners may dissolve it at will, subject, of course, to the legal consequences of the dissolution. Marriage, however, as is well stated in Hilton v. Roylance, supra, 'is regulated * * * and can be dissolved only through the sovereign power of the state, whenever justice to either or both parties or the welfare of the public demands it. * * * It is apparent that many of the rules of law applicable to the mar-

riage status differ widely in material respects from those applicable to mere civil contracts.'

"If marriage were no more than an ordinary partnership, with all its rights and liabilities, the course to be followed in the case at bar would be clear. Plaintiff, on obtaining his judgment against defendant Gail M. Paschal, would have a right to demand that the partnership be wound up, the property divided after the payment of the partnership debts, and the interest therein of the judgment debtor subjected to execution. If we attempt to apply this rule to the marriage status, it is apparent that it would destroy to a great extent the very thing the desire to protect which led the state to assume its control over marriage. The state's principal interest in the marriage status is the protection of the family as a unit, and of the minor children. The whole history of our legislation in Arizona, as well as elsewhere, shows this to be true. There are few things which would do more to destroy the solidarity of family life and the proper maintenance of the children of the marriage than the possibility that the community estate and earnings primarily intended by the state for this protection could be diverted from that purpose to satisfy debts in no way connected with the family."

Having established, at this point, the "intrinsic nature of the wife's interest in community property and income", and that it is not diminished by the agency conferred upon the husband, it remains only to be pointed out that the federal government is

bound by the state of the law in the respective states as respects what is property and income, and in whom title thereto is vested. This phase of the question is not considered in the government brief in this Arizona case, but in the corresponding brief in the Washington case (Poe v. Seaborn, No. 15), it is conceded that Congress has failed to make any provision in the Federal Revenue Acts, dealing with the determination of the person to whom income belongs in any of the states. This Court has repeatedly held that in this situation, it will follow State statutes, as interpreted by the State courts:

Warburton v. White, 176 U. S. 484.
Washington v. Miller, 235 U. S. 422.
Hines Trustees v. Martin, 268 U. S. 464.

We submit, further, that this line of reasoning effectively answers any argument which can be fashioned from the Corliss case. That decision quotes the provision of the 1924 Revenue Act expressly covering questions anticipated to arise in the case of revocable trusts. Although no analogy exists between trusts and community property in Arizona, the silence of Congress in the latter case clearly leaves the Treasury Department no recourse but to the Arizona law in seeking the "individual" to be taxed. As has been shown, successive Attorneys General have so ruled, throughout this controversy.

III.

References to Argument In Joint Brief

As stated at the outset, this brief is designed to develop the state of the Arizona law. Our effort is here directed primarily to answering the question put by the Attorney General in his opinion of July 16, 1927, respecting the intrinsic nature of the wife's interest and title in community income; for not until receipt of the brief for the Collector in this Court, was the Arizona taxpayer directly confronted with any other or further contention.

Since the various other questions, arising largely out of differences of interpretation of the Robbins decision, are common to the four cases affecting Washington, Louisiana, Texas and Arizona, they have been treated very fully in a joint brief, submitted herewith, and which we desire to have considered as a part of Arizona's case. Of the matters there dealt with, those respecting construction of the Revenue Acts, both intrinsically and extrinsically, are of course equally applicable to the four cases. Without here duplicating the argument fully developed in the common brief, we will consider only those aspects of it which in our view, are particularly applicable to the case in Arizona.

In the government brief, the point is stated, without argument, that the Revenue Act of 1926 should be construed, and applied, if possible, so as not to give married taxpayers residing in the community

property states an undue advantage over married taxpayers residing in other states. We think it significant that this proposition has not been analyzed in the opposing brief. For the first step would have been to ascertain upon what basis "the individual" to be taxed is determined in the other states referred to. If this question were propounded to any federal official charged with administration of the revenue acts, it cannot be doubted that he would answer that income is taxed to the husband in such states because by the law of those states he is the legal owner of it. Certainly that would be the answer of the present Attorney General, in conformity with his 1927 opinion.

Obviously, uniformity is not to be achieved by technical avoidance of the force and effect of the fundamental property system of certain of the states. All manner of difficulty is encountered in pursuance of any such policy. For instance, how is the test of "substantial control" to be applied in Common Law States, to the property or income conveyed by the husband to the wife? Is this to be treated, for income tax purposes, differently than corresponding property or income which, by operation of Arizona law, vests in the wife at the moment of acquisition? Or, taking the case of earnings of the wife, a factor of increasing importance, is this income to be taxed and surtaxed to the husband in Arizona, and not in the other states? Moreover, if the policy of taxing the husband upon the wife's half of the income by reason of his agency to administer it, is carried to

its logical length, and applied to other managing agents or partners, fresh complications, never intended, but expressly repudiated, by Congress, are at once encountered.

If this question of uniformity be viewed as one of equable adjustment between residents of the two classes of States, then there necessarily are to be considered the practical results of community property which tend to the disadvantage of the husband. Uniformity in the constitutional sense, is discussed in the joint brief, and its practical aspects will have been fully presented in consideration of the three preceding cases. The close similarity of the Arizona system to that of Washington, as commented upon in Cosper v. Valley Bank, (cited supra), is noted in the government brief. Clearly, upon the whole case, uniformity, in application of the income tax to Arizona, requires recognition of the wife's title to one-half of the community income, as prescribed by the statutes and decisions of this State.

Another proposition stated, but not argued, in the government brief, is that an assessment of income tax against the wife might be difficult of collection. Presumably, the failure to argue the point is by reason of the inability of government counsel to discover any instance, during the many years the practice of filing divided returns has prevailed, in which such imaginary difficulty has arisen. The leading Arizona cases from which we have quoted clearly establish the status of the tax as a community debt. No

difficulty is encountered in the collection of community debts in general, and no reason exists to anticipate any in the way of the United States. Upon the assessment of the tax, it becomes the duty of the husband, as the managing agent of the community, to pay it from community funds. In the absence of such payment, the government unquestionably has recourse to the several remedies available to it under the revenue acts.

In conclusion, we desire to refer briefly to the argument in the joint brief respecting the Robbins case, and show its particular application to the Arizona situation. We contend, of course, that if the holding of the Robbins case be now taken as applicable to the Arizona taxpayer, it must be by virtue of an analogy between the respective titles of the wife in the two states. In the California case, this Court expressly recognized that in at least two of the community property states, the wife has vested rights in respect of half the community property, as distinguished from "a mere expectancy" in California. Apparently, the test laid down was whether Warburton v. White, supra, and Arnett v. Reade, 220 U. S. 311 would be followed in the state under consideration. If this be the test, the complete answer is furnished by our La Tourette case, which not only follows, but cites with approval, Warburton v. White and Arnett v. Reade.

But we are not unaware that other and further contentions are made as to the extent of the holding in

the Robbins decision. As to these, we submit first, that they are contrary to any reasonable interpretation of the Revenue Act, in the light of its history and executive construction. And secondly, we submit that no reason which can be assigned for the Robbins decision can be made applicable to the facts of this Arizona case. We have already shown that the rule of Roberts v. Wehmeyer, 191 Cal. 601, from which this Court, in the Robbins case, determined the law of California, is not the law of Arizona. To the same extent, we believe our exposition of the Arizona system, as hereinabove contained, shows that both the nature and the extent of the powers conferred upon the husband are so fundamentally different in the two states, that any effect which can be ascribed to the final paragraph of the Robbins decision has no application to Arizona.

In its enumeration of the powers of the California husband, the Robbins decision states first that "he alone has the disposition of the fund." As to real property, the Arizona husband may neither sell nor encumber without the consent and joinder of the wife. As to personal property, his power of disposition is that of an agent, and as shown by the La Tourette case, his responsibility is likewise that of an agent. The difference, in this respect, in the two states accurately reflects the difference between Roberts v. Wehmeyer and our La Tourette case. What has just been said of the right of disposition, also emphasizes the difference between California and

Arizona in the matter of the wife's redress,—the second element mentioned in the Robbins case.

Neither is it true in Arizona, as pointed out in the case of California, that "the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's." It is elementary in this state that community property may not be taken for the separate debt of either spouse. Forsythe v. Paschal, supra. In California, the rule is otherwise, and the husband, as the owner of the property and income, during coverture, may apply it in payment of his debts, incurred either before or after marriage.

Finally, we have the power of testamentary disposition, and the rule of descent; the outstanding respect in which the situation dealt with in the Robbins case is diametrically opposed to that here under consideration. In Arizona, the wife has full power to dispose by will of her half of the community property, and in case of intestacy, it passes to her descendants, not his.

Clearly, the obviousness of the husband as the target for the shaft is confined to the jurisdiction of California.

CONCLUSION

We respectfuly submit that of the questions certified by the United States Circuit Court of Appeals in this case from Arizona, the first should be answered in the negative, and the second in the affirmative.

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